Federal Court Cour fédérale

Date: 20120524

Docket: T-1875-11

Citation: 2012 FC 637

Ottawa, Ontario, May 24, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

GORDON A. LIVELY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the National Parole Board Appeal Division [the Appeal Division] to affirm the National Parole Board's [the Board] decision denying the applicant day and full parole. The Board concluded that a release at this time would constitute an undue risk to public safety and the Appeal Division confirmed that the Board's decision was based on sufficient, relevant, reliable, and persuasive information and was reasonable and consistent with pre-release criteria set out in law and policy.

I. Facts

[2] The applicant, Gordon Allison Lively, is a 41-year-old inmate of Springhill Institution in Springhill, Nova Scotia.

[3] The applicant is currently serving his second federal sentence, an aggregate sentence of six years and six months for possession of Schedule I/II/III substances for the purpose of trafficking, obstructing a public/peace officer, theft, and failures to comply with undertakings and to attend court.

[4] The applicant's sentence commencement date was February 11, 2008. His statutory release date is June 11, 2012 and his warrant expiry date is August 10, 2014.

[5] The applicant last applied for day and full parole on October 20, 2010. The Board received the application on November 2, 2010 and the hearing was scheduled for April 19, 2011.

[6] Prior to the hearing, on March 24, 2011 and March 29, 2011, the applicant signed *Procedural Safeguard Declarations* in which he acknowledged receiving all information listed in two *Information Sharing Checklist Updates*. These updates were in addition to the *Primary Information Sharing Checklist* which the applicant had acknowledged receiving in a *Procedural Safeguard Declaration* dated November 16, 2009. Together, the *Primary Information Sharing Checklist* and *Information Sharing Checklist Updates* formed the material before the Board at the applicant's hearing of April 19, 2011.

[7] A *Procedural Safeguard Checklist Relating to Hearings* was also completed by the hearing officer, advising the applicant that a support letter dated April 14, 2011 was received, but could not be provided to him before the prescribed period of at least 15 days prior to the hearing. Notified of

the support letter, the applicant still chose not to request a postponement and the hearing was held as scheduled on April 19, 2011.

II. Impugned Decisions

[8] The Board denied the application for day and full parole, concluding that a release at this time would constitute an undue risk to public safety. Among the many factors considered, I note the following observations of the Board (Board Reasons, Applicant's Record [AR] at 5-8):

> […] You have been tested and treated for behaviour problems surrounding destructive and aggressive behaviour towards your peers and lived for five years in the Behaviour Modification Unit at the Nova Scotia Hospital. Final prognosis was "not good and it was recommended that any future antisocial activity be dealt with through the legal system….." […]
>
> Institutional Security Intelligence reports numerous incidents of poor behaviour ranging from inappropriate comments regarding staff to participation in the illegal tobacco trade. […] when it was suggested [*sic*] you would be referred to psychological counselling should you earn a day parole release, you made it clear you would not participate without certain conditions. […]
>
> Your case management team indicate that your risk for violent offending is low, however, risk for re-offending in a general manner if released is in the moderate/high range. Your attitude and level of insight continue to be of concern, and you continue to refuse to participate in the counselling you require. Your case management team, local police authorities, community supervisor, and one halfway house have all withdrawn their support for any form of early release at this time, and therefore the recommendation before the Board is to deny both. […]
>
> […] You were quick to point out that your involvement in the tobacco trade is not accurate, but you do acknowledge smoking in the past. […]
>
> Throughout the hearing you continued to emphasize ongoing frustrations with your Case Management Team. You consider a past sexual offence as a young offender as regrettable, but something you do not want to revisit by way of an assessment. You made it clear that should you be required to work with a psychologist, it would be

> for current stressors. You expressed considerable concerns with any further exploration of past trauma as a youth. […]
>
> In assessing your case against the pre release criteria, the Board is mindful of your current offences and, in particular, the illicit drug sub culture which you were emerged in. Intoxicant abuse is a dynamic directly related to your offence history, something you often engaged in as a coping mechanism in order to dismiss past traumatisation. While incarcerated, your impulsive and aggressive behaviours cannot only be attributed to frustration but also your lack of coping strategies and skills.
>
> You have made some progress, but your changes have been recent. You are impatient and do not believe further interventions or case preparation is required. The Board is satisfied that you will do what is required but only with conditions that you do not revisit past traumatisation issues. Unfortunately, these issues are considered to be the basis of your current resistance to further holistic treatment which would assist you greatly. You also lack a comprehensive release plan inclusive of a mental health support network. Considering all of the above, the Board concludes that a release at this time would constitute an undue risk to public safety. Hence day and full parole are denied.

[9] The applicant submitted an appeal form and cover letter dated May 30, 2011 which set out four grounds of appeal (Affidavit of Maureen Carpenter, Exhibit F at 29-30). The applicant then filed written submissions which included "new evidence" in the form of a psychological assessment dated May 20, 2011, a grievance dated May 9, 2011 concerning the time required to obtain the psychological report, and a note to file dated May 27, 2011 from the case management team indicating that no new institutional program referrals were required at this time.

[10] On October 11, 2011, the Appeal Division affirmed the Board's decision. In its reasons, the Appeal Division began by explaining its role (Appeal Division Reasons, AR at 9):

> [T]o ensure that the law and the Board policies are respected, that the rules of fundamental justice are adhered to and that the Board's decisions are based upon relevant and reliable information. […]

> [T]o confirm that [the decision-making process] was fair and that the procedural safeguards were respected.
>
> [T]o re-assess the issue of risk to re-offend and to substitute its discretion for that of the original decision makers, but only where it finds that the decision was unfounded and unsupported by the information available at the time the decision was made.

[11] The Appeal Division then outlined the applicant's arguments that:

(1) The Board erred in law when it considered a conviction for sexual assault the applicant incurred as a youth.

(2) It based its decision on erroneous and/or incomplete information when it considered his alleged involvement in the illegal tobacco trade within the institution.

(3) It breached or failed to apply its own policy when it conducted its review of his case without a current psychological assessment.

[12] Regarding the above arguments, the Appeal Division determined that:

(1) The Board had not erred in law by considering information related to offences committed as a young offender since this was consistent with subsection 101(*b*) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA], which calls on the Board to "[…] take into consideration all available information that is relevant to a case […]"

(2) The Board did not base its decision on erroneous and/or incomplete information. Allegations regarding the applicant's involvement in the illegal tobacco trade within the institution was information deemed to be reliable by the Correctional Service of

Canada [CSC], the Board noted the applicant's objections to this allegation, and the information was not a determining factor in the Board's decision.

(3) The Board did not breach or fail to apply its own policy. As explained at the hearing, a psychological assessment was not conducted in this case because the applicant did not meet the criteria for such an assessment. The Appeal Division added that it could not consider the psychological assessment submitted by the applicant in his appeal because this information was not before the Board at the time of the hearing.

[13] The Appeal Division concluded that the Board's decision was reasonable, consistent with the pre-release criteria set out in law and Board policy, and based on sufficient, reliable, and persuasive information.

III. Parties' Positions

[14] The Applicant has raised four issues. First, he alleges that the Board and Appeal Division's consideration of his youth court record was contrary to section 119 of the *Youth Criminal Justice Act*, SC 2002, c 1 [the YCJA]. In a letter dated April 16, 2012, counsel for the applicant informed this Court that this first ground would not be pursued in light of the arguments raised by the respondent in his written submissions. Second, because the allegations that the applicant was involved in the illegal tobacco trade within the institution were not substantiated by any reliable or persuasive evidence, the Board's reliance on these allegations was contrary to sections 7 and 24 of the *Canadian Charter of Rights and Freedoms*, 1982, RSC 1985, App II, 44, Schedule B [the Charter] and the principles set out by the Supreme Court in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75, 132 DLR (4th) 56 [*Mooring*]. Third, he alleges the Board failed to adhere to subsection 30(*d*) of the Commissioner's Directive under the CCRA by failing to request and

consider the most recent and current psychological assessment. Accordingly, the Board also failed to take into consideration all available relevant information as required by subsection 101(*b*) of the CCRA. Finally, the applicant argues that the Appeal Division erred in finding that it could not consider the psychological assessment dated May 20, 2011 that had not been before the Board.

[15] For its part, the respondent submits the Board rightfully considered allegations made against the applicant which it deemed reliable, that the Board's decision not to request a psychological assessment abided by the provisions of its enabling statute and policies, and that the Appeal Division correctly decided not to consider a new psychological assessment and other information as it had not been before the Board. The respondent maintains the applicant's parole hearing was procedurally fair, conducted in accordance with the principles of fundamental justice, and respected the applicant's Charter rights. The Board and Appeal Division's decisions were reasonable and supported in fact and law.

IV. Issues

[16] The applicant now raises the following three issues:

A. Did the Board err in noting the allegations that the applicant was involved in the illegal tobacco trade within the institution?

B. Was the Board's decision not to request a psychological assessment contrary to the CCRA and related policy?

C. Did the Appeal Division err in finding that it could not consider the new psychological assessment and other information that had not been before the Board?

V. Standard of Review

[17] Although the matter before this Court is a judicial review of the Appeal Division's decision, where the Appeal Division has affirmed a decision of the Board, this Court must also ensure that the Board's decision is lawful (*Cotterell v Canada (Attorney General)*, 2012 FC 302, [2012] FCJ 339; *TC v Canada (Attorney General)*, 2005 FC 1610 at para 18, [2005] FCJ 2163; *Cartier v Canada (Attorney General)*, 2002 FCA 384 at paras 8-10, [2002] FCJ 1386). Accordingly, where the second issue calls into question the Appeal Division's interpretation of the CCRA and YCJA, I agree with the respondent that the applicable standard of review is reasonableness (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160 [*Alliance Pipeline*]). However, this Court will nevertheless ensure that the Board's decision-making process was itself lawful as it relates to any possible contravention of the YCJA or CCRA and its policies.

[18] As for the first and third issues, both parties agree that the appropriate standard of review is correctness. The first issue raises questions of procedural fairness and Charter rights while the third is a general question of law regarding new evidence on appeal (*Alliance Pipeline*, above, at para 26).

VI. Analysis

A. *Did the Board err in noting the allegations that the applicant was involved in the illegal tobacco trade within the institution?*

[19] The applicant argues that the Board erred in law by relying on evidence he had been involved in the illegal tobacco trade within the institution when, in his opinion, there was no basis to prove it was reliable or relevant. Without elaborating further, he contends this was contrary to section 7 and subsection 24(2) of the Charter and contrary to the principles enunciated by the Supreme Court in *Mooring*, above, at paras 35-39.

[20] In its reasons, the Board made mention of this information as follows: "Institutional Security Intelligence reports numerous incidents of poor behaviour ranging from inappropriate comments regarding staff to participation in the illegal tobacco trade" (Board Reasons, AR at 6). The Appeal Division was satisfied that the Board did not base its decision on erroneous or incomplete information, that the Board only considered the information on file which stated the applicant had been participating in the illegal tobacco trade, that the CSC considered this information reliable, and that regardless, the information was not a determining factor in the Board's decision (Appeal Division Reasons, AR at 11).

[21] Having carefully reviewed the Board's reasons, I find no fault in the Appeal Division's ruling that the information to which the applicant objects did not constitute a determinative factor in the Board's decision. Furthermore, this Court has confirmed that while the Board must consider all relevant evidence given to it by the CSC (see subsections 25(1) and 101(*b*) of the CCRA), it is not within its purview to look behind the evidence that was collected by the CSC. As a result, any objections the applicant may have as to the accuracy of such evidence should be addressed with the CSC as set out in section 24 of the CCRA (*ASR v Canada (National Parole Board)*, 2002 FCT 741 at paras 20-21, [2002] FCJ 978).

[22] The applicant was made aware of the information found in the *Security Intelligence Information Update* through the *Primary Information Sharing Checklist* and *Information Sharing Checklist Updates*. He knew this information would be before the Board and had the opportunity to address its veracity. He did not make a request to correct the information pursuant to subsection 24(2) of the CCRA. He chose instead to inform the Board of his objections and this was acknowledged in the Board's reasons: "You were quick to point out that your involvement in the tobacco trade is not accurate, but you do acknowledge smoking in the past" (Board Reasons, AR at

7). As a result, I find no evidence that the Board did not abide by its “duty to act fairly” as described by the Supreme Court in *Mooring*, above, at paras 35-39.

B. *Was the Board’s decision not to request a psychological assessment contrary to the CCRA and related policy?*

[23] The applicant claims that the Board failed to adhere to subsection 30(*d*) of the Commissioner’s Directive 712-1, entitled “Pre-Release Decision Making” and made pursuant to sections 97 and 98 of the CCRA. Subsection 30(*d*) states that once it is determined that an offender will proceed with a review, the institutional Parole Officer/Primary Worker will request a psychological assessment if required. The applicant contends a psychological assessment is required in the case of an application for day and/or full parole.

[24] As described in section 97, the Commissioner’s Directives are rules for the management of the CSC, for matters described in the CSC’s guiding principles set out in section 4, and generally for carrying out the purposes and provisions of Part I of the CCRA (Institutional and Community Corrections) and its regulations. The respondent is of the view the policy directives that properly guide the Board are found in the National Parole Board Policy Manual [Board Policy] and not the Commissioner’s Directives. The respondent points to section 2.3 of the Board Policy which states the following:

Psychological Assessments	Évaluations psychologiques
3. Psychological assessments may be completed for an offender at several points of the sentence. The need for a psychological assessment will be determined by behavioral characteristics of offenders, their criminal history, and features of the offence.	3. Des évaluations psychologiques au sujet d'un délinquant peuvent avoir lieu à divers moments de l'exécution de la peine. La nécessité d'une évaluation psychologique sera déterminée par les caractéristiques du comportement du délinquant,

	ses antécédents criminels et les caractéristiques de l'infraction.
[…]	[…]
B. Pre-Release Psychological Assessments	B. Évaluations psychologiques prélibératoires
Requirements	Exigences
[…]	[…]
Mandatory Referral Criteria - All Other Offenders	Critères de renvoi obligatoire - tous les autres délinquants
a. persistent violence;	a. violence persistante;
b. gratuitous violence;	b. violence gratuite;
c. referrals for detention;	c. renvoi en vue du maintien en incarcération;
d. conditional release reviews for offenders with indeterminate or life sentences;	d. examens relatifs à la mise en liberté sous condition des délinquants condamnés à une peine d'une durée indéterminée ou à l'emprisonnement à perpétuité;
e. high risk sex offenders - those with two or more sexually related convictions; untreated or drop out; deviant arousal from phallometry (paraphilia); use of a weapon.	e. délinquants sexuels à risque élevé - deux condamnations ou plus pour crimes sexuels, absence ou abandon de traitement, excitation déviante selon les tests phallométriques (paraphilie), utilisation d'une arme.

[25] According to Board Policy then, a psychological assessment was not required since the applicant did not fall under any of the mandatory referral criteria listed above.

[26] Even if the Commissioner's Directive 712-1 were to apply, section 30(*d*) states that it is the institutional Parole Officer or Primary Worker who will request a psychological assessment, not the

Board. More importantly, an examination of the Commissioner's Directive reveals that it contains essentially the same criteria for mandatory psychological assessments as those found in Board Policy and the determination would therefore have been no different in this case:

PSYCHOLOGICAL ASSESSMENTS	ÉVALUATIONS PSYCHOLOGIQUES
[…]	[…]
Mandatory Referral Criteria for Offenders	Critères d'aiguillage obligatoire des délinquants
60. A psychological assessment is mandatory for offenders who meet any of the following criteria:	60. Une évaluation psychologique est obligatoire lorsque le délinquant satisfait à un ou plusieurs des critères suivants :
a. persistent violence (three or more convictions for a Schedule I offence);	a. violence persistante (trois condamnations ou plus pour une infraction visée à l'annexe I de la LSCMLC);
b. gratuitous violence;	b. violence gratuite;
c. referrals for detention;	c. renvoi en vue d'un examen de maintien en incarcération;
d. conditional release reviews for offenders with indeterminate or life sentences;	d. examens de cas visant la mise en liberté sous condition de délinquants purgeant une peine d'emprisonnement à perpétuité ou d'une durée indéterminée;
e. sex offenders who were identified as being high risk in the Specialized Sex Offender Assessment or those who remain untreated or dropped out of programs. If an offender met the criteria for Specialized Sex Offender Assessments as per CD 705-5 and one was not	e. délinquants sexuels qui présentent un risque élevé selon leurs résultats à l'Évaluation spécialisée des délinquants sexuels ou qui n'ont bénéficié d'aucun traitement ou ont abandonné leur programme de traitement. Si un délinquant satisfait aux critères de

completed, the offender must be assessed prior to referral to the NPB for consideration of conditional release;	l'administration de l'Évaluation spécialisée des délinquants sexuels, énoncés dans la DC 705-5, et qu'elle ne lui a pas été administrée, il doit être soumis à une telle évaluation avant que son cas soit présenté à la Commission nationale des libérations conditionnelles en vue d'une éventuelle mise en liberté sous condition.
f. offenders serving a life sentence for first or second degree murder.	f. délinquants purgeant une peine d'emprisonnement à perpétuité pour meurtre au premier ou au deuxième degré.

[27] Finally, with respect to the applicant's argument that the Board failed to adhere to the requirement under subsection 101(*b*) that it "take into consideration all available information that is relevant to a case," I would simply state that this provision does not impose a duty on the Board to require a psychological assessment nor any duty to postpone a hearing while it waits for such information to become available. As the documentation reveals, the applicant was in the process of obtaining a psychological evaluation. As a matter of fact, he filed a grievance due to the lateness in obtaining the report. The responsibility for requesting a postponement lay with the applicant, as he was aware of the forthcoming psychological assessment. I therefore conclude that the Board's decision, as it relates to the psychological assessment, fully respected CCRA requirements and related policy. At the hearing, counsel for the applicant modified his argument by indicating that it is the case management team that should have sought the psychological report. A review of the case management report indicates that it was aware that the applicant had sought psychological support and that there had been a change of psychologists following his transfer to another institution.

[28] Furthermore, the report indicates that the sessions with the new psychologist led to a personality conflict and that the applicant stated he would not see a psychologist if day parole was granted. Accordingly, the case management team transmitted the information to the Board that it considered accurate, up-to-date, and as complete as possible. With these facts at play, there was no requirement to seek a psychological report and no obligation to do so.

C. *Did the Appeal Division err in finding that it could not consider the new psychological assessment and other information that had not been before the Board?*

[29] The applicant also invokes subsection 101(*b*) in his argument relating to the Appeal Division's decision not to consider the psychological assessment and other information issued after the hearing before the Board, but nevertheless made available to the Appeal Division. The applicant argues that it was incumbent on the Appeal Division to consider this other information, which should have been placed before the Board in the first instance, and to ensure that such information was properly considered.

[30] Examining this issue, the words of my colleague Justice Michel Beaudry come to mind, expressed in *Aney v Canada (Attorney General)*, 2005 FC 182 at para 29, [2005] FCJ 228: "In light of the [*Cartier*, above] decision, the role of this Court, when the Appeal Division has affirmed the [Board's] decision, is to first, analyse the decision of the [Board] and determine its lawfulness, rather than that of the Appeal Division. If the Court concludes that the Board's decision is lawful, there is no need to review the Appeal Division's decision." In the present case, I have confirmed that the Board committed no error in conducting its risk analysis and that its decision was lawful.

[31] The Appeal Division's jurisdiction, as explained in its decision, is to "re-assess the issue of risk to re-offend and to substitute its discretion for that of the original decision makers, but only where it finds that the decision was unfounded and unsupported by the information available at the

time the decision was made" (Appeal Division Reasons, AR at 9). Accordingly, the Appeal Division committed no error by not considering the psychological assessment and the other information. It made its decision in light of the information that was in front of the Board, as required. Also, the applicant did not file an application to admit the new evidence and only invoked the new psychological assessment and other information in his written brief submitted to the Appeal Division. As a result, I find the Appeal Division acted correctly.

[32] At the hearing, counsel for the applicant amended orally the relief sought:

- that there should be an expedited parole hearing by a different panel,
- that a declaration be made that the Board and appeal decisions were made without having sufficient evidence, and
- that this Court orders day parole.

[33] Counsel for the respondent objected to this request, arguing that the evidence does not support such relief and also that this Court does not have jurisdiction to grant some of what is asked. For the reasons given above, I agree.

[34] Counsel for the respondent informed the Court that his client was not seeking costs if the Court agreed with his position. No costs will be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and no costs will be granted.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1875-11
STYLE OF CAUSE:	GORDON A. LIVELY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	May 16, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	NOËL J.
DATED:	May 24, 2012

APPEARANCES:

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